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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

K. JEFFREY ASFOUR et al.,

Plaintiffs and Respondents,

v.

GROVER H. NIX III, et al.,

Defendant and Appellant.

B201479

(Los Angeles County
Super. Ct. Nos. SC088042,
BC3452310)

APPEAL from a judgment of the Los Angeles Superior Court, John L. Segal,
Judge. Affirmed in part, reversed in part, and dismissed in part.

Grover H. Nix III, in pro. per., for Defendant and Appellant.

Leonard, Dicker & Schreiber, Steven A. Schuman and Brad Parr, for Plaintiffs and
Respondents.

This is an action by K. Jeffrey Asfour and his wife Rita, against their former friend, John Corrodi, Jr., and Corrodi's business associate, Grover Nix III, for, among other things, breach of contract and fraud. The Asfours alleged that Corrodi and Nix duped them into loaning over \$300,000 to a business trust that was no longer in existence, and was embroiled in bankruptcy proceedings or, at a minimum, was merely a vehicle used to shield assets from creditors. The loan was never repaid. A jury found in favor of the Asfours, awarding them \$475,000 in compensatory damages against both defendants, and \$500,000 in punitive damages against Nix. Each defendant appealed, although Corrodi subsequently satisfied the award of compensatory damages and his appeal was dismissed.

Nix maintains there is no support for the jury's verdict against him. We find no merit in this contention. Nix also insists the record lacks meaningful evidence of his financial condition and that, as a result, the punitive damages award cannot stand. We agree and conclude that, because the Asfours failed to introduce evidence of Nix's financial condition at the time of trial, the punitive damages award was improper. We reverse that portion of the judgment and direct the trial court to enter a new judgment deleting the punitive damages award. In all other respects, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

The relationship between Corrodi and Asfour

Appellant John Corrodi, Jr. and respondents Jeffrey and Rita Asfour¹ have been neighbors in Malibu since 1982. Corrodi, a successful licensed real estate broker since 1969 who concentrated his business in Malibu for over 42 years, was also Asfour's trusted friend. The two men frequently dined together and attended the same church. Corrodi had assisted Asfour, a retired aerospace engineer in his 70's, with several property-related matters, including supporting him at city and planning commission

¹ Mrs. Asfour had minimal involvement in the events leading to this dispute. Accordingly, unless otherwise indicated, references to "Asfour" are to Mr. Asfour alone.

meetings when Asfour wanted to build a guest house, and helping him obtain a lot-split in 2004 so he could build a second house on his lot.

In 2004, Asfour borrowed approximately \$1 million, funds he planned to use within a few months to finance the construction on the newly split lot. Corrodi, from whom Asfour “had no secrets,” knew Asfour had a large sum of money in the bank, and explored with him the possibility of making a short-term loan to one of Corrodi’s clients. Asfour readily agreed. In late 2004, Corrodi arranged a loan between Asfour and actor Lou Gossett, Jr. by which Asfour loaned Gossett \$200,000 for six months at 15 percent interest and four points (which Asfour and Corrodi split, each receiving \$4,000). The loan, which was actually made to the Lou Gossett Family Trust, was secured by a third trust deed on Gossett’s home. Everything went fine in that transaction, and Asfour was repaid.

In early March 2005, Corrodi approached Asfour about making another short-term loan, this time to appellant Grover Nix III. Corrodi described the terms of the loan to Asfour as essentially “the same thing” as the Gossett loan, although it would be a better deal for Asfour because he would get six points instead of four. The loan was to be made to the “Oxshott Trust,”² of which Corrodi was the trustee, at 15 percent interest for six months. It would be secured by a third trust deed on real property located at 29055 Wagon Road, Agoura (Property), where Nix lived. Asfour would not receive monthly payments. All interest and points would be paid at the end of the loan period. Asfour would provide \$320,000 when the loan closed, and receive a single payment of \$380,000 six months later. Asfour went with Corrodi to view the Property, and agreed to these terms. Mrs. Asfour approved escrow instructions on March 7, 2005, and signed a blank promissory note. The loan did not close at that time.

² Corrodi told Asfour the Oxshott Trust was Nix’s family trust. That was not true.

Grover Nix III

Nix testified that he graduated from Harvard Law School in 1968, and was admitted to the California and Massachusetts Bars in 1969. He obtained a Doctorate of Law at Kings College, London in 1972. For 12 years he was a partner at the largest bankruptcy law firm in New England. Later, he became a partner in Nix & Wendell, a firm with offices in Washington D.C., Boston, New Hampshire, Paris and Saudi Arabia. He also testified that he had been general counsel to the person in charge of the North American branches of Barclay's Bank,³ and that he is a "Lord of the Manor" with access to England's House of Lords.

In 1995, Nix was convicted of felony larceny for stealing \$80,000 from a client. He was disbarred in Massachusetts and resigned from the Bar in California with charges pending, and has not practiced law since. Since then, Nix has worked as an independent "consultant," raising capital for real estate and other projects.

In addition to the judgment at issue here, Nix has at least four civil judgments pending against him. They include judgments in: (1) an action by a legal publisher in Massachusetts; (2) an eviction in an unlawful detainer action, which is being collected by a levy on the salary of Nix's wife, a public school teacher; (3) an action in which Nix guaranteed a debt for his son; and (4) an action by the landlord of his law firm in Boston.⁴

³ This contradicted deposition testimony in which Nix claimed to have been Barclay's general counsel.

⁴ In addition, Nix is or was a defendant in a federal court action involving the IRS, the Galardis and their family trust (Phoenix Family Trust). The Galardis are, or were, friends of Corrodi whom Nix allegedly helped to hide funds from the IRS, and from whom he is accused of stealing money. Nix has also been involved in bankruptcy and foreclosure actions, and was a defendant in a criminal proceeding involving the Asfour transaction.

Although Corrodi claimed otherwise, Asfour testified Nix and Corrodi never mentioned that Nix had been disbarred, or that he was a convicted felon. Asfour would not have made the loan if they had.

The Oxshott Realty Trust

In 1985, Nix formed a Massachusetts “business trust,” entitled the Oxshott Realty Trust (Oxshott Trust). At trial, Nix testified the Oxshott Trust was established because business trusts enjoy significant tax advantages. However, at his deposition, Nix testified he had formed the Oxshott Trust, not to minimize tax liability, but to protect his assets from creditors. Nix was the initial trustee of the Oxshott Trust, appointed by its beneficiaries, his wife and children. The initial corpus of the trust was Nix’s house in Massachusetts and other real property. According to the initial trust document recorded in October 1985, the Oxshott Trust had a lifespan of 20 years. Nix testified he recorded an amended declaration of trust in Massachusetts on October 7, 2003, changing the trust’s termination date to 2004. However, Nix testified that, after a lender reviewed that amendment, and refused to make a loan upon learning the trust would expire in 2004, Nix executed another amendment in May 2003 extending the life of the Oxshott Trust another 20 years. Nix said he was only able to find that second amendment about a week before trial during a search of boxes stored in his son’s garage in Arizona. Nix was unable to explain how the document executed in May 2003 could have addressed the lender’s concern about the termination in 2004 when that 2004 termination date had not been fixed until October 2003, nor did he explain why the October 2003 amendment did not supersede the one allegedly executed in May 2003.

Nix testified he is free to change the trustee of the Oxshott Trust whenever he wants, and has done so many times. On October 7, 2003, Nix resigned, and asked Corrodi to take over as trustee of the Oxshott Trust. Corrodi agreed to do so as a favor to Nix. Corrodi was not compensated for his services.⁵ At his deposition, Corrodi said he

⁵ Corrodi was involved in a number of real estate transactions in which Nix was somehow involved, and had earned commissions in transactions involving friends whom

never received written instructions regarding his duties as trustee. However, at trial, he recalled Nix had in fact written him a letter regarding those duties, directing Corrodi to basically “follow [Nix’s] wishes.”⁶ At trial, Corrodi testified he was “generally” aware of the trust’s financial condition when he assumed the duties of trustee. This flatly contradicted statements made at his deposition, in which he testified he “had no knowledge of [the trust’s] financial condition” when he became trustee. As trustee of the Oxshott Trust, Corrodi did nothing between the time of his appointment and February 28, 2005, when he signed and filed a Voluntary Petition for Chapter 11 Bankruptcy on behalf of the Oxshott Trust. Nix, who was not Corrodi’s cotrustee, conducted trust business. At some point after October 2003, Nix claimed he became trustee again, at Corrodi’s designation.⁷ No document reflects Nix’s re-appointment. Nix claims no such documentation is required, but if it was, he would have prepared it.

The Property

Nix purchased the Property from William Ashton in May 2003 for just over \$1.7 million. Nix made no down payment. The first half of the purchase price (\$850,000) was secured by a first trust deed in favor of Americus Financial. Ashton carried back the remainder of the purchase price. Nix placed the Property in the Oxshott Trust. Ashton’s

Nix had referred to Corrodi. He claimed never to have earned a commission in any transaction in which Nix was directly involved, including the transaction with Asfour. Corrodi had testified otherwise in his deposition, but corrected that testimony before trial.

⁶ Among those instructions is a letter purportedly written by Nix to Corrodi on January 15, 2005, regarding Nix’s agreement to lease the Property from the Oxshott Trust for \$10,000 per month. This was another document Nix failed to produce until just before trial. Asfour claimed the letter was created and back-dated by Nix for purposes of this litigation. Nix denied that accusation, claiming he was only able to find the document after searching his son’s garage in Arizona just before trial.

⁷ For example, in a letter written in April 2004, Nix referred to himself as trustee of the Oxshott Trust. He did the same thing in a document filed in the bankruptcy court in March 2005, even though, just eight days earlier, Corrodi had signed the bankruptcy petition in his capacity as trustee of the Oxshott Trust.

notes were to be repaid in two equal payments of \$325,250, the first in June 2004, and the second in June 2005. Nix never made the payment to Ashton in 2004. Nix also failed to pay property taxes on the Property, which was in tax default and subject to an IRS lien. In September 2004, after Nix failed to make the first \$325,000 payment, Ashton initiated a nonjudicial foreclosure. That proceeding was delayed repeatedly for various reasons, including the February 2005 bankruptcy filing by the Oxshott Trust.

Asfour's loan to the Oxshott Trust

It was against this backdrop that Corrodi approached Asfour in early March 2005 about loaning \$320,000 to the Oxshott Trust. Corrodi told Asfour the trust was a family trust, just like one Asfour's family has (the Gamila Family Trust), and the one involved in the Gossett transaction. Corrodi did not tell Asfour the Oxshott Trust was an asset protection trust, nor did he reveal Nix's history. Asfour testified Corrodi never revealed the Oxshott Trust was in bankruptcy. Corrodi claimed he did, although, if he did, it was not until weeks later. Corrodi did not tell Asfour the Property was the subject of a foreclosure proceeding or in tax default, nor did he tell him anything about the terms of Nix's purchase of the Property from Ashton.

A Preliminary Title Report was issued in mid-March 2005. That report, which Asfour never saw before making the loan, reflected a number of serious and potential problems, including: (1) the tax default and IRS lien; (2) a notice of default by Americus Financial, the holder of the first trust deed; (3) two additional notices of default and a notice of trustee's sale; (4) a pending action by the Phoenix Family Trust and its principals (the Galardis), against Nix for fraud with respect to title to real property, slander of title, elder abuse and conversion; and (5) an abstract of judgment for approximately \$18,000 against Nix by a former landlord.

After the escrow instructions were signed, Corrodi did nothing to complete the loan until Friday, April 22, 2005. On that day, he told Asfour the IRS was about to foreclose on the Property and they needed to close escrow that afternoon. He asked Asfour to bring his checkbook and meet him and Nix at Malibu Escrow; Asfour did so. At that meeting, the loan officer said it would not be possible to close escrow that day;

the company no longer accepted personal checks and, in any case, the escrow instructions required the money to be wired.

According to Asfour, Nix and Corrodi became very agitated, and implored him to make the loan outside of escrow, offering him additional security if he agreed to do so.⁸ After “a lot of begging and pleading” Asfour agreed to do so, and the men drove to a bank where Asfour and Corrodi each held accounts. Asfour wrote a check for \$320,000 to the Oxshott Trust on the Gamila Trust account (on which he noted “T.D. on 29055 Wagon Rd.”). Nix and Corrodi then obtained a cashier’s check from the bank. Asfour testified that Nix “grab[bed] that check from the teller and rush[ed] out the door.” Asfour did not receive a deed or a promissory note that day, but he still trusted Corrodi and assumed Corrodi and the escrow company would handle it.

Nix and Corrodi had not told the truth. The IRS was not threatening to foreclose on the Property if Nix failed to provide \$320,000 on April 22, 2005. Rather, Nix needed the money to deposit in the federal court action brought against him by the IRS and the Galardis to avoid a contempt charge and possible imprisonment.⁹

What happened after April 22, 2005

After April 22, Corrodi made repeated attempts to assure Asfour he would be repaid. For example, on May 4, 2005, Corrodi provided documents to Asfour which

⁸ The additional security offered was a UCC-1 statement for some artwork Nix owns, and an interest in proceeds purportedly due the Oxshott Trust from a foreclosure sale for a property on Dixon Street in Redondo Beach, “in an amount up to \$420,000” (the Dixon proceeds). Notwithstanding Nix’s offer, Asfour did not believe he was getting security in any artwork. There is also a dispute as to the worth, if any, of the pledged Dixon Proceeds, both because the Oxshott Trust was in bankruptcy and Nix and Corrodi may have lacked authority to grant an interest in the proceeds, and because the amount actually due the Oxshott Trust was only about \$57,000.

⁹ In that action, Nix was subject to an order requiring him to pay the Galardis \$320,000, but had repeatedly failed to do so even after seeking and receiving multiple continuances. It was his failure to pay those funds that formed the basis for the contempt proceeding against Nix on April 22, 2005. Nix deposited the \$320,000 Asfour gave him with the federal court on April 22, 2005.

purported to demonstrate Nix's strong financial standing and ability to repay the loan. A great deal of trial time was devoted to Asfour's contention that Nix had fabricated these and other documents.¹⁰ For weeks after the loan was made, Corrodi continued to tell Asfour he was in the process of having the deed recorded, that the Property was being refinanced, and that Asfour had no reason to be concerned that he would not be repaid. A deed was finally recorded on May 19, 2005. Asfour's deed was not the third trust deed on the Property as he had been promised. It was actually in fifth position.

Asfour was not mollified. Finally, in early September, he contacted the escrow agent to obtain the promissory note. The agent did not have a copy, and told Asfour to obtain the note from his broker, Corrodi. On September 7, 2005, Asfour asked Corrodi for the promissory note. Corrodi promised to deliver it the next day. The next day Corrodi gave Mrs. Asfour a handwritten promissory note dated April 22, 2005, and due September 24, 2005. Asfour was concerned; he did not believe the note Corrodi delivered was the same as the version Mrs. Asfour approved in March (which had not been dated April 22, 2005), and the note Corrodi delivered was "full of mistakes."

Asfour decided to contact a foreclosure company. When he did, he was surprised to learn the two senior liens on the property were already in foreclosure, and a foreclosure sale was set for the following week. Asfour consulted Dean Isaacson, a real estate developer with whom he had worked in the past, and retained counsel. Asfour, his attorney and Isaacson met with Nix and Corrodi, who made additional proposals in an attempt to give Nix additional time to forestall foreclosure. No agreement was reached.

¹⁰ We requested, but the parties were unable to provide, the documentary evidence offered and admitted at trial. Asfour's counsel, charged by the trial court with the responsibility of maintaining those materials, asserted that he lost them and asked us to accept his trial notebooks instead. Nix took issue with many of the documents Asfour's counsel wanted to submit. Instead, Nix attempted to file copies of some exhibits admitted at trial, but his submission was incomplete. In the end, we conclude the documents are unnecessary for our disposition. None of the documents will be accepted.

The foreclosure sale was conducted on September 27, 2005. At the sale Asfour loaned Isaacson cashier's checks to buy the Property, after Asfour became concerned about bidding himself. Isaacson bid \$1 more than Ashton's full credit bid (of approximately \$238,000), and took title to the Property.¹¹

Asfour initiated this action in December 2005. The following causes of action are relevant here: first cause of action for fraud (against Corrodi and Nix); second cause of action for breach of written contract (against Corrodi); third cause of action for elder financial abuse in violation of Welfare and Institutions Code section 15657 (against Corrodi and Nix); fifth cause of action for breach of fiduciary duty (against Corrodi); seventh cause of action for money lent (against Nix); and tenth cause of action for breach of oral contract (against Nix).¹²

A jury trial was conducted in May 2007. At the conclusion of that trial, the jury returned unanimous verdicts against Corrodi on the causes of action for breach of contract, fraud, elder abuse and breach of fiduciary duty, and against Nix on claims for breach of contract, money lent, fraud and elder abuse. The Asfours were awarded compensatory damages of \$475,000. The jury also found that Nix (but not Corrodi) acted with malice, oppression, fraud or despicable conduct, and awarded the Asfours \$500,000 in punitive damages. These appeals followed.

¹¹ Throughout fall 2005, Nix and Corrodi, who still thought Asfour controlled the Property, made numerous attempts to convince him to reconvey the property to Nix which was actually owned by Isaacson. Isaacson conveyed title to Megan Hofferth, who evicted Nix.

¹² Shortly thereafter, Nix filed an action against Asfour, Isaacson, Hofferth and others (Case No. BC345310). The two cases were tried together and Nix, who was not successful on any of his affirmative claims, filed an appeal from that judgment. Nix has now requested that we dismiss that appeal. His motion is granted.

DISCUSSION

1. *The Asfours' Motion to Dismiss*

The Asfours have moved to dismiss most of Nix's appeal as moot. After filing his opening brief, Corrodi satisfied the judgment (on his own behalf as well as Nix's), paying all compensatory damages and interest due the Asfours, and their attorneys fees incurred to date. The Asfours acknowledge that they may not recover additional compensatory damages from Nix, and assert the only remaining issue is Nix's liability for punitive damages. Nix asserts multiple objections to the motion to dismiss, most of which relate to matters outside the record.¹³ However, Nix also maintains the appeal is not moot because, among other things, he has been found liable for breach of a contract to which he claims he is not a party, and for elder abuse in an action in which individual liability may not attach. We agree that the fact judgment was entered against Nix on these and other claims constitutes sufficient grounds to deny the Asfours' motion to dismiss, notwithstanding the fact that Nix cannot be required to pay additional compensatory damages.¹⁴ “[W]henver the judgment, if left unreversed, will preclude the party against whom it is rendered as to a fact vital to his rights, such as to the validity of a contract upon which his rights are based, it cannot properly be said that there is left before the appellate court but a moot question, even though on account of changed conditions the relief originally sought by appellant cannot be granted upon the reversal of such judgment.” (*Hartke v. Abbott* (1930) 106 Cal.App. 388, 394; see also *Eye Dog*

¹³ Nix's opposition to the Asfours' motion to dismiss is replete with improper references to matters outside the appellate record. Our review is confined to the record of proceedings that took place in the court below. All other matters, which are beyond the scope of review, will be disregarded. (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1; see also 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 334, pp. 385–386, & § 337, pp. 387–388.)

¹⁴ Nix also contends Corrodi overpaid the Asfours by about \$21,000. However, Corrodi (who agrees the Asfours were overpaid) does not seek reimbursement of those funds, and Nix lacks standing to do so. (See 9 Witkin, Cal. Procedure, *supra*, § 329, pp. 376–377.)

Foundation v. State Board of Guide Dogs for the Blind (1967) 67 Cal.2d 536, 542; cf., *Laird v. Blacker* (1992) 2 Cal.4th 606, 614 [in a legal malpractice action, actual injury exists independent of amount of damages owed].)

2. Breach of contract

Although his argument is difficult to follow, Nix apparently contends the judgment against him requires reversal because the trial court instructed the jury on elements of liability for breach of a written contract to which Asfour never claimed Nix was a party or breached, and refused to modify its instructions when the error was brought to its attention.¹⁵ As a result, Nix contends the jury erroneously rendered a special verdict by which it “found *written breach of contract* by Corrodi and Nix” This contention has no merit.

First, Nix is correct that he was not a named defendant to the second cause of action for breach of written contract. However, he ignores completely the fact that he was a defendant to the tenth cause of action, which is also for breach of contract. In that claim, Asfour alleged that he and Nix entered into an agreement on April 22, 2005, by which Asfour agreed immediately to loan Nix and Corrodi \$320,000. The record does not support Asfour’s allegation that Nix signed escrow instructions on April 22, 2005. However, Asfour also alleges that, on that day, when it became clear the escrow would not close, Nix and Corrodi offered to assign to Asfour the Dixon proceeds and a security interest in artwork owned by Nix, if Asfour agreed to fund the loan outside of escrow. Asfour agreed to that arrangement, which Nix memorialized in a May 4, 2005 letter seeking a “short extension” from Asfour. Substantial evidence was introduced at trial to

¹⁵ We reject Nix’s assertion that the Asfours lack standing to sue. First, they filed this action on behalf of their family trust. Claims by a family trust may be pursued by its trustee. (See Prob. Code, § 16249 [“trustee has the power to prosecute . . . actions . . . for the protection of trust property . . .”].) Second, the Asfours also sued as individuals, which they are clearly entitled to do. (See *Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 170–171 [where res of trust is owned by individuals as trustees, who are the beneficiaries of the trust, the individuals may maintain an action in their own name, and need not mention trust at all].)

support the tenth cause of action. Specifically: acting in concert with Corrodi, and using the vehicle of an expired trust of which he was either trustee or beneficiary, depending on which status suited his needs at a given time, Nix convinced Asfour to loan him \$320,000, in exchange for an oral agreement to provide a third trust deed on the Property, plus additional security in the form of an interest in the Dixon proceeds and in Nix's personal art collection.¹⁶

Second, Nix may not now complain about a jury instruction to which he agreed, at least implicitly. As the trial court repeatedly observed, Nix's own instructions were both insufficient and untimely. The trial court ordered the parties to submit their proposed instructions five days before the final status conference.¹⁷ Nix failed to comply with that order. Rather, as the trial court observed, most of Nix's proposed instructions came in "very late;" others were "extremely late." Moreover, Nix did not object to Asfour's contract instructions during the conference on jury instructions, even though the instructions on his own contract action against Asfour were discussed at that time. Rather, Nix said nothing until the court was in the middle of instructing the jury. When Nix raised objections at that point, the court refused to modify the instructions, stating it intended to "read [them] as they were given to [it] and agreed to by the parties."¹⁸ Nix responded that he would point out to the jury that he was not a party to the claim for

¹⁶ Indeed, although Nix and Corrodi claimed surprise that the escrow could not close on April 22, 2005, it is clear that Nix, at least, knew that result was likely even before he met with Asfour. He came to the meeting with a UCC-1 statement he had prepared that morning, clearly aware he might need to offer an additional inducement to persuade Asfour to lend the money he had promised.

¹⁷ Indeed, the trial court noted that the delay caused by the failure to submit timely jury instructions, forced a last minute conference to address Asfour's objections just minutes before the instructions were given, a situation the court deemed "inexcusable" and one that placed it and the jury in a very difficult position.

¹⁸ The jury was instructed as to the elements of a breach of contract claim, and told the contract may be written or oral. It was also instructed that, although Corrodi's and Nix's legal interests were aligned and the instructions equally applicable to each, it was required to consider and decide each defendant's case as an independent lawsuit.

breach of a written contract. He did exactly that in his closing argument, even going so far as to make the flatly incorrect assertion that Asfour had not alleged *any* “cause of action of a breach of contract against [him].”

Finally, Nix mischaracterizes the verdict. He claims the jury’s “special verdict” incorrectly “found *written breach of contract* by Corrodi and Nix and awarded ‘Asfour’ \$475,000” That is not what the verdict says. In response to a “general verdict with special questions,” the jury stated only that “On the cause of action for breach of contract against Defendant Grover Nix, we find in favor of Asfours.” It made an identical finding on the claim for “money lent.” In sum, the record contains ample support for the jury’s finding that Nix formed—and breached—a binding agreement with Asfour, and that any potential instructional confusion that may have resulted about the nature of that agreement was waived by Nix’s failure to timely object or submit a proper instruction of his own.

“A judgment may not be reversed for instructional error in a civil case ‘unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.’ (Cal. Const., art. VI, § 13.)” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.) Nix has not shown the instructions given caused a miscarriage of justice. There are ample bases for the jury to have found Nix liable for breach of an agreement to repay Asfour’s loan.

3. *Evidence of pending criminal charges against Nix for theft from Asfour.*

Nix maintains prejudicial error occurred and the trial court abused its discretion, when it allowed Asfour’s counsel to question him regarding the criminal action then pending against Nix for his theft of \$320,000 from Asfour. We conclude the evidence was improperly admitted, but the error does not constitute reversible error. It is not reasonably probable a result more favorable for Nix would have been reached even if the evidence had been excluded. (*Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 574.)

Prior to trial, Nix moved, in limine, to exclude references to his prior felony conviction and disbarment. After substantial discussion with counsel, the trial court

granted that motion without prejudice in connection with Asfour's case against Nix. However, it left open the possibility that the evidence might be admitted under appropriate circumstances in connection with Asfour's case against Corrodi and his claim that, as his broker, Corrodi had a professional duty to disclose such information about the person to whom Asfour was considering lending funds. The court also ruled the evidence might be admissible to impeach Nix's credibility in his case against Asfour, and his claim that he could readily borrow \$2 million to reacquire the Property.¹⁹ When that discussion concluded, Corrodi sought the trial court's view as to the admissibility of the criminal charges then pending against Nix and Corrodi for theft of \$320,000 from Asfour. The court's initial inclination was to exclude that evidence.

A lot of trial time was devoted to the attempts Nix made to convince Asfour he was a wealthy man and a creditworthy risk, to allay Asfour's concerns about being repaid, and to get Asfour to deal with Nix and make the loan. Some of that evidence related to Nix's claim that he (or his family's trust) owns 20–30 original Picassos, for which he paid about \$10 million. Nix stores those paintings in a closet at an apartment in Marina Del Rey. At trial, he testified it was “positively not” the case that the art is kept in a closet to hide it from his judgment creditors.

At that point, Asfour's counsel sought to impeach Nix with his deposition testimony. Corrodi's counsel objected, based on the ruling on Nix's motion in limine. The objection was overruled. The court found Nix had opened the door with “his prior testimony to the previous question.” However, the court instructed the jury the deposition testimony was being read solely to permit the jury to assess Nix's credibility, and “not for any other purpose.” At his deposition, Nix had testified he kept the Picassos in a closet “because [he was] in litigation,” and because he has “a criminal complaint pending against” him. When asked to clarify his reference to the criminal charges pending against him, Nix admitted he was “out on bail for stealing \$320,000 from Mr.

¹⁹ The motion became moot after Nix opened the trial by telling the jury he had been “disbarred and convicted of a felony in 1995”

Asfour.” No doubt this evidence was prejudicial. The impeachment evidence should have been limited to Nix’s deposition testimony regarding the civil litigation. The trial court abused its discretion by admitting inflammatory evidence of the pending criminal action against Nix.

However, we disagree with Nix that reversal is required as a result of this judicial error. Our review of the record reveals it would be futile to remand the action for further proceedings. Reversal is required only if an error results in a miscarriage of justice deemed prejudicial. (Cal. Const., art. VI, § 13.) This constitutional provision is amplified by Code of Civil Procedure section 475, which states that trial court error is reversible when it affects “the substantial rights of the parties,” and the appellant “sustained and suffered substantial injury, and that a different result would have been probable if such error . . . or defect had not occurred or existed.” Thus, a miscarriage of justice exists if and only if, in the absence of the error, a result more favorable to the appellant would probably have occurred.

The evidence of the pending criminal case against Nix was admitted to allow the jury to assess credibility. Independent of that problematic admission, there was ample evidence from which the jury easily could have made that assessment and drawn the same unanimous conclusion it apparently reached here regarding Nix’s veracity. There was evidence that Nix has stolen before. As he told the jury himself, he was convicted of a felony and has been disbarred in two states for embezzling client funds. Moreover, there were numerous instances at trial where Nix’s veracity was brought into question. For example, he admitted having created a document on which he forged Asfour’s name for this litigation. There were also several other documents—all useful to Nix—which surfaced in his possession just before trial, notwithstanding Asfour’s pretrial discovery and document demands. Asfour claimed those documents were fabrications. The jury, by finding unanimously in his favor, apparently believed Asfour’s version of events. Moreover, it appears to have deliberated for less than four hours after an eight-day trial, indicating this was not a close case. (See *People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1329, fn. 3 [“the brief period of jury deliberation shows that the case was not a

close one from the jury's point of view"].) In sum, even without the erroneously admitted evidence of the pending criminal action, Nix would not have prevailed. Accordingly, no reversal is required. (*Ibid.*; see also *First American Title Ins. & Trust Co. v. Cook* (1970) 12 Cal.App.3d 592, 599 ["Even if error occurred, [appellate] court should not reverse where it is apparent reversal would not affect the ultimate result."].)]

4. *The fraud claim.*

Nix makes a number of arguments to support his assertion that there is no evidence he committed fraud. To the extent we are able to distill them, those arguments appear to be: (1) The trial court should have enforced a subpoena Nix served on the custodian of records for Merrill Lynch, because evidence yielded thereby might have exonerated him from the charge that he forged some materials he sent to Asfour to demonstrate his creditworthiness; (2) those documents may have been forged by the Galardis, with whom Asfour "admit[ted] meeting . . . on approximately five . . . occasions in early 2005"; (3) Nix cannot be liable for fraud because the jury found that Corrodi was not, and the evidence against each defendant, largely adduced at the preliminary hearing in the criminal action, was identical; (4) there is no evidence Asfour relied on any representation Nix made on April 22, 2005; and (5) Asfour is an "adult," who, instead of meeting Nix and Corrodi at the bank to give them \$320,000 on April 22, "could have just as easily driven home and said 'No thanks.'"

We reject each argument. First, the trial subpoena to which Nix refers is not in the record. We have no way to assess whether it was valid, timely, sought the information Nix claims it did, or even if it was served. The custodian of records for Merrill Lynch was subpoenaed by Asfour and did testify at trial. He testified that Merrill Lynch does not permit its brokers to communicate with clients through unregulated e-mail addresses, and that to do so would be a serious violation of policy. He also testified that a search of the company's electronic records, kept in accordance with its regular business practices, should have yielded the original or copies of documents Nix claimed he had received from two financial advisors at Merrill Lynch. It yielded nothing, and that the financial advisor who purportedly signed one document, which was not on approved letterhead,

claimed he never wrote it. In addition, an e-mail Nix claimed that another Merrill Lynch financial advisor sent him in early May 2005, and which he forwarded to Asfour, also should have been but was not in the company's records.

Second, the record contains absolutely no evidence to corroborate Nix's conspiracy-based theory that the Galardis may have forged these or other documents, none of which is relevant here. Nor does Nix bother to explain why they might choose to do so.

Third, Nix's assertion that the jury could not have found him liable for fraud without also making the same finding against Corrodi because evidence against the two defendants is identical, is incorrect.²⁰ In the first place, the jury was properly instructed to consider the case against each defendant independently. Moreover, the record contains a significant amount of evidence from which the jury could conclude that Nix has long been, and remains, willing to lie and fabricate evidence in order to obtain whatever goal is at hand. There is evidence he created the Oxshott Trust in order to protect his assets from legitimate creditors—of which he has many—and used the trust as a tool, switching hats from beneficiary to trustee whenever he pleased, without observing any formalities. In addition, there is evidence that, when it suited his purposes, Nix manufactured or doctored documents to advance his cause, whether it be to show the expired Oxshott Trust had suddenly regained life, or to create an e-mail demonstrating his creditworthiness to calm Asfour's concerns or, as he readily admitted at trial, to "recreate" (i.e., manufacture) a contract on which he forged Asfour's signature, for purposes of his lawsuit.²¹

²⁰ We disregard Nix's improper references to testimony from the criminal proceedings or other matters outside our record.

²¹ The fact that Nix admittedly manufactured a written "agreement" to which he forged Asfour's signature for purposes of litigation, further buttresses the conclusion that the jury was justified in finding Nix engaged in conduct more repugnant than Corrodi's acts of betrayal against his friend. The clear evidence of fraud by Nix also negates his assertion that the jury reached "inconsistent verdicts."

Nix's fourth and fifth assertions are equally meritless. Clearly, in retrospect, Asfour was unwise to rely on representations made by Corrodi and Nix in connection with a loan ostensibly secured by the Property. By now, no one knows that better than Asfour. Nevertheless, there is ample evidence to support the jury's conclusion that Asfour did in fact rely on the representations and promises made by his trusted friend and neighbor, acting on Nix's behalf, that he would get the deed he anticipated receiving and be repaid in a timely fashion. In light of clear evidence of such reliance, Nix asserts what is now painfully obvious: Asfour should have known better than to trust someone like him. Absent Asfour's prior knowledge of Nix's character, however, "caveat emptor" is not a legitimate defense to a claim of fraud.

5. *The punitive damages award.*

Nix contends the punitive damages award cannot stand because the record lacks evidence of his net worth. We agree.

We review the trial court's award of punitive damages for substantial evidence. Plaintiff bears the burden of proof. (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 679–680 (*Baxter*); *Kelly v. Haag* (2006) 145 Cal.App.4th 910, 916 (*Kelly*)).

A punitive damages award hinges on three factors: (1) the reprehensibility of defendant's conduct; (2) the reasonableness of the relationship between the amount of the award and plaintiff's harm; and (3) in view of defendant's financial condition, the amount of damages necessary to punish him and discourage future wrongful conduct. (*Baxter, supra*, 150 Cal.App.4th at p. 679. Only the third prong is at issue.

A punitive damages award "can be so disproportionate to the defendant's ability to pay that the award is excessive for that reason alone." (*Adams v. Murakami* (1991) 54 Cal.3d 105, 111, italics omitted (*Adams*)). Thus, "an award of punitive damages cannot be sustained on appeal unless the trial record contains meaningful evidence of the defendant's financial condition." (*Id.* at p. 109.) "Without such evidence, a reviewing court can only speculate as to whether the award is appropriate or excessive." (*Id.* at p. 112.) "What is required is evidence of the defendant's ability to pay the damage award." (*Robert L. Cloud & Associates, Inc. v. Mikesell* (1999) 69 Cal.App.4th 1141,

1152.) “Thus, there should be some evidence of the defendant’s actual wealth. Normally, evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income.” (*Baxter, supra*, 150 Cal.App.4th at p. 680.) The pivotal question is whether the amount of the award will have a deterrent effect without being excessive. Our Supreme Court has declined to prescribe any particular standard for assessing a defendant’s ability to pay punitive damages. (*Adams, supra*, 54 Cal.3d at p. 116, fn. 7.) But, it has held that actual evidence of the defendant’s financial condition is essential. (*Id.* at p. 119.) The award must be premised on the defendant’s financial condition at the time of trial. Courts consistently speak in terms of a defendant’s “financial condition,” his “net worth,” or his “ability to pay.” (*Kelly, supra*, 145 Cal.App.4th at pp. 914–916.) Absent meaningful evidence of a defendant’s ability to pay, we are left impermissibly to speculate as to whether the award is appropriate or excessive.

At trial, Asfour presented no meaningful evidence of Nix’s financial condition. We are aware that Nix testified he made \$100 million from the sale of a gun company to “the Israelis” in 1995, and that he may own as many as 30 original Picassos. However, there is also evidence Nix has no income, has multiple unsatisfied judgments for unspecified amounts pending against him, that whatever money he may once have had in offshore accounts is gone, and that, even if the Oxshott Trust still existed at the time of trial, its assets were tied up in bankruptcy.

Asfour provided no data demonstrating Nix’s income at the time of trial, the critical point in time. (See *Kelly, supra*, 145 Cal.App.4th at p. 915.) In addition, apart from the debt owed on the Property, Asfour provided no evidence of Nix’s actual expenses or liabilities at any period of time. Based on his considerable braggadocio, we might surmise that, even if Nix had the millions in assets he wanted Asfour to believe he had, his debts were equally great. (See *Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 58 [“Without evidence of the actual total financial status of the defendant[], it is impossible to say that any specific award of punitive damage is appropriate.”].) It is precisely for

this reason that courts require the plaintiff to introduce “evidence of the actual total financial status of the defendants.” (*Ibid.*)

The burden of introducing evidence of Nix’s financial condition was on Asfour, the party seeking to recover punitive damages. (*Adams, supra*, 54 Cal.3d at p. 119.) Asfour does not argue, and the record does not reflect, that Nix resisted any legitimate attempt to obtain accurate information about his financial condition.²² Accordingly, the punitive damages award against Nix must be reversed. We note that, because we reverse the award on the basis of insufficient evidence, the issue may not be retried. “[Asfour] had ‘a full and fair opportunity to present his case for punitive damages, and he does not contend otherwise.’ . . . When a punitive damage award is reversed based on the insufficiency of the evidence, no retrial of the issue is required. . . .” (*Baxter, supra*, 150 Cal.App.4th at p. 681, citations omitted.)²³

DISPOSITION

The judgment is reversed to the extent it awarded punitive damages and, on remand, the trial court shall enter a new judgment deleting the award of punitive damages. In all other respects, the judgment is affirmed. The Asfours’ motion to dismiss

²² Under Civil Code section 3295, subdivision (c), a plaintiff seeking punitive damages may move for a pretrial discovery order pertaining to the defendant’s financial condition. There is no evidence Asfour made such a motion. Even without such an order Asfour could have subpoenaed documents or witnesses to testify at trial to establish Nix’s financial condition. (*Kelly, supra*, 145 Cal.App.4th at p. 919.) He chose not to do so.

²³ We need not address Nix’s remaining challenge to the verdict on the ground that he cannot be held personally liable as either a trustee or beneficiary of the Oxshott Trust. As appellant, Nix’s contention of reversible error must be supported by argument and citation to pertinent legal authority. This requirement applies equally to appellants acting without counsel. (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 522–523.) The “failure of an appellant in a civil action to articulate any pertinent or intelligible legal argument in an opening brief may, in the discretion of the court, be deemed an abandonment of the appeal” (*Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1119.) To the extent that Nix has joined in the briefs filed by Corrodi (in Corrodi’s now dismissed appeal), we have reviewed those briefs and conclude that they add nothing to the arguments raised by Nix in his briefs and rejected by us in the body of this opinion.

portions of the appeal is denied. Nix's motion to dismiss his appeal from that portion of the action related solely to Los Angeles Superior Court Case No. BC345310 is granted. Each party shall bear its own costs on appeal.

NOT TO BE PUBLISHED.

WEISBERG, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.